IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 25, 2009

STATE OF TENNESSEE v. CLIFFORD W. MCCULLEY

Appeal from the Criminal Court for Sullivan County
No. S54,174 R. Jerry Beck, Judge

No. E2008-01783-CCA-R3-CD - Filed June 11, 2009

The defendant, Clifford W. McCulley, pleaded guilty to burglary, a Class D felony, and theft of property valued at $500 or less, a Class A misdemeanor, in exchange for an agreed effective two-year sentence as a Range I, standard offender with the manner of service to be determined by the trial court. After a hearing, the trial court ordered the defendant to serve his sentence in confinement. The defendant appeals from the trial court's denial of alternative sentencing. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Stephen M. Wallace, District Public Defender; and Andrew J. Gibbons, Assistant District Public Defender, for the appellant, Clifford W. McCulley.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Janine Myatt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On April 10, 2008, the defendant pleaded guilty to one count of burglary, *see* T.C.A. § 39-14-402 (2006), and one count of theft of property valued at $500 or less, *see id.* §§ 39-14-103, -105. The stipulated facts at the plea hearing are as follows:

> [O]n September 10th, 2007, the Kingsport Police Department responded to the Brookhaven Nursing Home to a complaint that there was a tall white male with a sleeveless black T-shirt attempting to gain entry into their car.

> The officers were able to track the suspect down the Greenbelt Parkway to Freedom Homes where they found [the defendant] had broken into the Freedom Homes building. . . .
>
> He tried to flee on foot at that point. He was apprehended fairly quickly. He was wearing gloves at the time. And he was in the possession of a prescription pill bottle containing hydrocodone. And it was marked as the property of one of the employees of Freedom Homes.

The defendant agreed to a two-year sentence and $250 fine for the burglary conviction and a concurrent 11-month, 29-day sentence and $100 fine for the theft conviction. The agreement provided that the defendant was permitted a hearing to determine whether alternative sentencing was appropriate.

At the July 24, 2008 hearing, the 35-year-old defendant testified that he had been incarcerated for the previous two months on a probation revocation based upon his committing the offenses at issue in the hearing. He testified that, prior to his incarceration, he lived with his fiancée, Jeanette Lynn Norman, and three children. Two of the children were from Ms. Norman's previous marriage, and the third child belonged to him and Ms. Norman. Ms. Norman was pregnant with a fourth child at the time of the hearing. The defendant also had two children outside the home; however, he had surrendered his parental rights, and the children lived in the custody of their grandparents.

The defendant testified that he financially supported the household and that he and Ms. Norman were making payments to purchase the house in which they lived. He stated that, prior to his incarceration, he worked with Harry Small of Four Seasons Paving where he drove a dump truck. He testified that he had no prior felony convictions.

The defendant testified that his mother died of cancer and his father died "of more or less alcohol" at about the same time. He stated that he tended to his parents, who were both bedridden, in the time preceding their deaths. The defendant testified that these events caused him to start drinking heavily. He admitted that he remained an alcoholic and that most of his previous criminal offenses involved alcohol or drug use. The defendant testified that he had been drinking heavily and was intoxicated on the night of the offense. He expressed his desire that the court place him in the John R. Hay House for alcohol treatment as a condition of an alternative sentence.

The defendant testified that he wished to return to his employment with Mr. Small so that he and Ms. Norman could complete the purchase of their home. He wanted to continue to support his family, and he said, "[Ms. Norman] has real bad problems whenever she gets pregnant." He assured the court that he was "trying to live a lot better than [he] was."

On cross-examination, the defendant admitted that he was serving a probationary sentence on another misdemeanor offense at the time he committed the offenses at issue. His probationary sentence for yet another offense had been revoked three years earlier. He also admitted that, on May 10, 2007, the court ordered him to attend alcohol treatment in Kingsport but that he never complied. The defendant denied allegations in his presentence report that he was fired from his job with Howington Construction because he had "sticky fingers," and he maintained that he was fired due to his being incarcerated.

Ms. Norman testified that she was engaged to the defendant. She said, "[T]he problem is with [the defendant] being incarcerated, is I'm having trouble paying all the bills and trying to raise three kids and pregnant with the other one." She testified that the family would lose their home because they lacked the income to make house payments.

Ms. Norman testified that, should the defendant receive an alternative sentence, she and the defendant intended to marry. She testified that she worked two jobs but that she could not maintain employment as her pregnancy progressed.

At the close of proof, the trial court noted as favorable factors for the defendant that he obtained a high school diploma as an adult and that he had a record of employment. The trial court noted that a letter from Mr. Small read, "I well like Clifford McCulley work with me," and it acknowledged the possibility of post-release employment. The trial court also expressed sympathy for Ms. Norman.

The trial court viewed as unfavorable the defendant's six previous misdemeanor convictions and his two prior probation revocations. The court noted that the defendant had used marijuana since the age of 16 and that the defendant was a "dope user" who, on one occasion, failed to attend court-ordered drug treatment. The court reasoned, "I know if I put him on probation again he'd violate and it would be the third time." The trial court denied the defendant's request for alternative sentencing and ordered him to serve his sentence in the Tennessee Department of Correction.

The trial court entered judgments of conviction[1] on July 24, 2008, and the defendant filed a timely notice of appeal on August 14, 2008. He cites the trial court's denial of alternative sentencing as his only assignment of error.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo.

[1]The judgments also reflect an order that the defendant pay $321 in restitution to Freedom Homes.

Id. If appellate review reflects that the trial court properly considered all relevant factors and if its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

As the Range I recipient of a Class D felony conviction, the defendant is considered a favorable candidate for alternative sentencing. T.C.A. § 40-35-102(6). "[F]avorable status consideration," however, does not equate to a presumption of such status. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). Rather, sentencing issues are determined by the facts and circumstances presented in each case. *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). As the recipient of a sentence of ten years or less, the defendant is also eligible for probation. *See* T.C.A. § 40-35-303(a). The defendant bore the burden of showing that he was entitled to probation. *See, e.g.*, *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999) (holding that defendant bears the burden of establishing his "suitability for full probation").

To determine the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing and arguments as to sentencing alternatives;
> (4) The nature and characteristics of the criminal conduct involved;
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
> (7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b). Additionally, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative." *Id.* § 40-35-103(5).

The record before us reflects that the trial court weighed both favorable and unfavorable factors in determining the defendant's eligibility for probation or alternative sentencing, and our review is de novo with a presumption of correctness. *See Ashby*, 823 S.W.2d at 169. The trial court specifically noted the defendant's criminal history and failures at complying with alternative sentences in the past. *See* T.C.A. § 40-35-103(1)(C) (stating that a sentence of confinement may be based upon the consideration that "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant"). Upon consideration of the defendant's failed attempts at alternative sentences in the recent past, the trial court acted within its discretion in ordering a sentence of confinement. The defendant had failed to comply with drug

treatment, which he now requests, and he was serving a probationary sentence when he committed the offenses at issue. We will not disturb the trial court's order of confinement.

Accordingly, the judgments of the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE